LIBRARY
SUPREME COURT. U. S.

Office-Supreme Court, U.S.
FILED
APR 9 1959
JAMES R. BROWNING, Clerk

Nos. 380, 381, and 512

In the

Supreme Court of the United States

OCTOBER TERM, 1958

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JOHN R. HANSEN AND SHIRLEY G. HANSEN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

BURL P. GLOVER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

CLIFTON E. BAIRD AND VIOLET L. BAIRD,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE AMICUS CURIAE, NATIONAL AUTOMOBILE DEALERS ASSOCIATION IN SUPPORT OF TAXPAYER

JAMES C. MOORE,
2000 K Street, Northwest,
Washington 6; D. C.
Attorney of Record.

L. W. ANDERSON,
1201 Corrigan Tower,
Dallas 1, Texas.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

Question Presented .....
Statute and Other Authorities Involved .....
Statement .....
Argument .....
Conclusion .....
Certificate of Service .....
Appendix .....

Page

Cases

American Bemberg Corporation v. United States (Dist. Ct. Del.), 150 F. Supp. 355 13

Baird v. Commissioner (7th Cir.), 256 F. 2d 918 7

Barham v. United States (4th Cir.), 256 F. 2d 456 10

Bazley v. Commissioner, 331 U. S. 737, 67 S. Ct. 1489, 91 L. Ed. 1782 5

Chamberlin v. Commissioner of Internal Revenue (6th Cir.), 207 F. 2d 462 5

Charlotte Union Bus Station v. Commissioner of Internal Revenue (4th Cir.), 209 F. 2d 586 8

Chatham & Phoenix National Bank, 1 B. T. A. 460 13

Commissioner v. Cleveland Trinidad Paving Co. (6th Cir. 1932), 62 F. 2d 85 7

Commissioner of Internal Revenue v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981 5

Commissioner v. Edwards Drilling Company (5th Cir. 1938), 95 F. 2d 719 11

Daley v. United States (9th Cir.), 243 F. 2d 466 9

First National Bank of Birmingham v. Daniel (5th Cir.), 239 F. 2d 801, 227 F. 2d 353 and 228 F. 2d 803 5

Frost Lumber Industries, Inc. v. Commissioner of Internal Revenue, 128 F. 2d 693 (5th Cir. 1942) 6, 14

Glover v. Commissioner (8th Cir.) 1958, 253 F. 2d 735 7

Gregory v. Helvering, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596 5

Hansen v. Commissioner of Internal Revenue (9th Cir.), 258 F. 2d 585 7

Page

Higgins v. Smith, 308 U. S. 473, 60 S. Ct. 355, 84 L. Ed. 406 5

Hine Pontiac v. United States (5th Cir.), D. C. N. D. Tex. 1957, 1 AFTR 2d 58-774 ..... 7, 15

Johnson v. Commissioner (4th Cir.), 233 F. 2d 952 7

Keasby & Mattison v. United States (3rd Cir.), 141 F. 2d 163 7

Kilborn v. Commissioner (5th Cir.), 29 T. C. 102 7

Long Poultry Farms v. Commissioner of Internal Revenue (4th Cir.), 249 F. 2d 726 13

R. H. McDonald, Tax Court Memorandum Opinion, Docket 35526 (August 31, 1953) 14

Marine Chevrolet Co., Inc. v. United States (D. C. 1958), 161 F. Supp. 62 7

Massey Motors v. United States (D.C.S.D. Fla. 1957), 156 F. Supp. 516 7

Minnesota Tea Co. v. Helvering, 302 U. S. 609, 58 S. Ct. 393, 82 L. Ed. 474 5

Modern Olds v. United States (5th Cir.) D. C. N. D. Tex. 1957 7

Motors Securities Company, Inc., Tax Court Memorandum Decision (1952) P-H paragraph 52, 316 13

Schaeffer v. Commissioner of Internal Revenue (6th Cir.), 258 F. 2d 861 7

Spring City Foundry Company v. Commissioner, 292 U. S. 182, 54 S. Ct. 644, 78 L. Ed. 1200 14

Telephone Directory Advertising Company v. U. S. (Ct. of Claims), 142 F. Supp. 884 11

Tennessee, Alabama & G. Ry. Co. v. Commissioner, 6 Cir., 187 F. 2d 826 5

Page

Texas Trailercoach v. Commissioner of Internal Revenue (5th Cir.), 1958, 251 F. 2d 395 ..... 5, 7, 15

United States v. Harmon (10th Cir.), 205 F. 2d 919 9

U. S. v. Safety Car Heating & Lighting Company, 287 U. S. 88, 56 S. Ct. 353 (1953) 7

West Pontiac v. Commissioner (5th Cir) 1958, 257 F. 2d 810 7

Statutes

Internal Revenue Code of 1954:
Section 1.446-1 General Rule for Methods of Accounting, Proposed Regulations, Methods of Accounting 19

INCOME TAX REGULATIONS: Section 29.41-3, Method of Accounting 19, 20

Legal Opinion 1086 I-1 C. B. 87 20

Miscellaneous

Mertens Law of Federal Income Taxation, Volume 2, Section 12.60, Page 127 6

In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 380

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

JOHN R. HANSEN AND SHIRLEY G. HANSEN.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

No. 381

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

BURL P. GLOVER,

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

No. 512

CLIFTON E. BAIRD AND VIOLET L. BAIRD,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

AMICUS CURIAE BRIEF OF NATIONAL AUTOMOBILE DEALERS ASSOCIATION

To the Honorable Chief Justice and Judges of the Supreme Court of the United States:

NOW COMES the National Automobile Dealers Association and with permission of the respective counsel of record first obtained, files herein its Amicus Curiae Brief in support of the taxpayer's position in connection with

the above cases, namely, John R. Hansen and Shirley G. Hansen, Burl P. Glover, and Clifton E. Baird and Violet L. Baird.

Since this is an Amicus Curiae Brief, references to the "Opinions Below" and "Jurisdiction" are not necessary.

QUESTION PRESENTED

Whether a taxpayer on an accrual basis, is liable for taxes for an amount set up by a finance company, being a portion of the finance charge, when such credit is contingent and the finance company admits no liability to the taxpayer for such credit.

STATUTE AND OTHER AUTHORITIES INVOLVED

In addition to the statutes and regulations quoted in the brief by the Commissioner, there is also incorporated in this brief Internal Revenue Regulations Section 1.446-1, Section 29.41-3, and Legal Opinion 1086 I-1 C. B. 87. (Appendix, page 19 to 20.

STATEMENT

Being in the position of amicus curiae, it wishes to state that the facts, of course, vary in each particular case, but fundamentally the proposition involved is the question of liability of a taxpayer on an accrual basis to pay taxes on an account carved out of the finance charges and carried by the finance company on its books and known as "dealer's reserves." The transactions involved start when a purchaser is desirous of purchasing an automobile, trailer

or other chattel on an installment basis and approaches a dealer to purchase the same. The dealer has a contract with either one finance company or several finance companies whereby the finance company agrees to accept the notes of dealer's purchaser upon approval of the finance company of the credit of the purchaser at a specific rate of charge. It is further agreed that the finance company out of said finance charges sets aside a portion thereof in a contingent credit known as "dealer's reserves." This credit is subject to the following contingencies:

(a) It is not actually in existence at the time and it is merely a credit on the books of the finance company and will be paid sometime in the future over a period of twelve (12), twenty-four (24) or thirty-six (36) months as the purchaser makes his monthly payment to the finance company. If the purchaser defaults after the first month, of course, the credit then would not be in existence or ever come into existence.

(b) It is subject to being reduced by the fact that the purchaser after paying over a period of several months defaults and the security (automobile, trailer or other chattel) is sold and the amount received for the sale of such security is insufficient to pay the debt due to the finance company—such difference is taken from this credit.

(c) This credit since it is a sum which is collectible over a period of twelve (12), twenty-four (24) or thirty-six (36) months but is set up immediately at the time the note is transferred, is also subject to being reduced by a prepayment on the part of the purchaser of the debt in full.

The transaction of the purchaser, dealer and the finance company is of necessity a simultaneous or three-cornered

transaction. After the price between the dealer and purchaser has been agreed upon, it is necessary for the finance company to approve the purchaser's credit before the transaction is completed. The forms are furnished by the finance company together with the purchaser's application for credit. When the finance company approves the purchaser's credit, the transaction is then completed by the down payment being paid by the purchaser and the execution of the notes by the purchaser. The notes are already made payable to the finance company, and thus the transaction is then completed with the assignment of the notes having been previously agreed upon by the finance company upon the approval of the credit of the purchaser. Upon receipt of the note or notes, as the case may be, the finance company makes an entry in its books crediting a certain portion of the finance charges to the dealer which is known as "dealer's reserve." This credit is not the obligation of the finance company but is really, in truth and in fact, the obligation of the purchaser as he makes his monthly payments over the period of the loan transaction. Thus being a portion of the finance charge it is construed to be interest and thus is collectible over a period of time and is a credit which the finance company admits no liability to the dealer until the dealer's reserve reaches a certain specified amount or the transaction has been completed by the purchaser paying for the security without any loss attendant thereto.

ARGUMENT

To represent to the Court in any manner that the transfer of the sale of the notes and the purchase of the property are two (2) separate transactions is, of course, not true as shown hereinabove. This Court on numerous occasions in approaching the principles of taxation has said that it looks at the substance of the transaction to determine what really occurred rather than the formality of the transaction.[1]

As was also said by Judge Wisdom in the case of *Texas Trailercoach v. Commissioner of Internal Revenue (5th Cir.), 251 F. 2d 395*, "* * * it is necessary to peel off the outer layer of the business transaction and get down to its core." In this case the Court, of course, held it was one transaction and logically so. The Courts have continually held in a similar situation where usury penalties were held to be recovered against the bank by the purchaser that it certainly constituted one transaction and not two transactions as contended by the Commissioner.[2] Of course, the fundamental problem is whether or not such entry on the books by the finance company constitutes accruable income to the taxpayer or dealer. Accruability of the income has been a rather troublesome problem through the years. As

[1] *Chamberlin v. Commissioner of Internal Revenue (6th Cir.), 207 F. 2d 462; Gregory v. Helvering, 293 U. S. 465, 55 S. Ct. 266, 79 L. Ed. 596; Minnesota Tea Co. v. Helvering, 302 U. S. 609, 58 S. Ct. 393, 82 L. Ed. 474; Higgins v. Smith, 308 U. S. 473, 60 S. Ct. 355, 84 L. Ed. 406; Commissioner of Internal Revenue v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981; Bazley v. Commissioner, 331 U. S. 737, 67 S. Ct. 1489, 91 L. Ed. 1782; Tennessee, Alabama & G. Ry. Co. v. Commissioner, 6 Cir., 187 F. 2d 826.*

[2] *First National Bank of Birmingham v. Daniel (5th Cir.), 239 F. 2d 801, 227 F. 2d 353 and 228 F. 2d 803.*

stated by Judge Hutcheson in *Frost Lumber Industries v. Commissioner of Internal Revenue (5th Cir.), 128 F. 2d 693*, "* * * we are reminded of Captain Cuttle's famous dictum, 'the bearings of that observation lies in the application of it.' * * *" Or the result being that the Commissioner construes it to the benefit of the Government without regard to the facts. *Mertens Law of Federal Income Taxation, Volume 2, Section 12.60, Page 127*, says as follows:

> "Accrual contemplates (1) an existing valid liability of the debtor or payor, (2) a reasonable fixing or determination of the amount of the liability, and (3) a reasonable degree of collectibility. There must be no contingency or unreasonable uncertainty qualifying the payment or receipt, as the case may be."

The Commissioner's contention it appears, therefore, falls down in all three instances. In the first place, there is no valid liability of the debtor or payor, as the finance company has no liability to the dealer, for such dealer's reserve account until it has exceeded a certain stated percentage, which is not in question here. The liability, if any, is on the purchaser of the automobile and his liability is only to that certain percentage of the finance charge which is paid monthly over a period of time. The so-called dealer's reserve credit is made immediately upon receipt of the notes by the finance company.

In the second place, there is no reasonable fixing or determination of the amount of the liability. This is true because it is a contingent fund which is subject to being

collected, in the first place, and depleted in the second place, by losses where the security does not satisfy the obligation.

In the third place, there is no reasonable degree of collectibility as it is an obligation that is uncollectible. The finance company admits no liability to the dealer for this amount and it certainly could not be sued upon and collected in any Court of Law. All of the Court decisions except the Tax Court up until the *Baird* and *Schaeffer* cases[3] recognized that reserves are not taxable.[4]

Certainly all of such Courts had some basis to justify their decisions. Which Courts, therefore, have taken the sounder viewpoint in this regard?

It is our position that a mere bookkeeping entry by a finance company does not constitute accruable income. Nothing has been received. As stated by the Supreme Court in *U. S. v. Safety Car Heating and Lighting Company, 287 U. S. 88, 56 S. Ct. 353 (1953):*

> "* * * No doubt the income thus accrued derived sustenance and value from the soil of past events. We do not identify the seed with the fruit that it will yield.

[3]*Baird v. Commissioner (7th Cir.), 256 F. 2d 918* and *Schaeffer v. Commissioner of Internal Revenue (6th Cir.), 258 F. 2d 861.*

[4]*Hansen v. Commissioner of Internal Revenue (9th Cir.), 258 F. 2d 585; Glover v. Commissioner (8th Cir.), 1958, 253 F. 2d 735; West Pontiac v. Commissioner (5th Cir.) 1958, 257 F. 2d 810; Texas Trailercoach v. Commissioner (5th Cir.) 1958, 251 F. 2d 395; Johnson v. Commissioner (4th Cir.), 233 F. 2d 952; Modern Olds v. United States (5th Cir.), D.C.N.D. Tex. 1957; Hine Pontiac v. United States (5th Cir.), D.C.N.D. Tex. 1957; Massey Motors v. United States (D.C.S.D. Fla. 1957), 156 F. Supp. 516; Marine Chevrolet Co., Inc. v. United States (D.C. 1958), 161 F. Supp. 62. Keasby & Mattison v. United States (3rd Cir.), 141 F. 2d 163; Commissioner v. Cleveland Trinidad Paving Co. (6th Cir. 1932), 62 F. 2d 85; Kilborn v. Commissioner (5th Cir.), 29 T.C. 102.*

> "Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, not the potency of fruition. With few exceptions, if any, it is income as the word is known in the common speech of men. Lynch v. Hornsby, supra, p. 344. When it is that, it may be taxed, though it was in the making long before. MacLaughlin v. Alliance Inc. Co., supra, at p. 249, 250; Taft v. Bowers, 278 U. S. 470; Helvering v. Canfield, supra, Cf. Lucas v. Alexander, 279 U. S. 573, 577, 578, Towne v. Eisner, 245 U. S. 418; Eisner v. Macomber, 252 U. S. 189, 206, 207."

The item of dealer's reserve is created by a contract between the finance company and the dealer. The contract provides that the credit is contingent, that it is subject to being depleted by losses and that the finance company has no obligation to pay that credit until the happening of certain events. Liability under contract for credit so created has been continually held by the Courts as not taxable through a long line of decisions. In the case of *Charlotte Union Bus Station v. Commissioner of Internal Revenue (4th Cir.), 209 F. 2d 586*, the Commissioner sought to assess the bus company for certain deficiencies but the Court held that the matters were controlled by the contracts between the parties, and said:

> "The government must assess taxes upon income which the taxpayer has received or which he has a fixed right to receive under existing contracts. Spring City Foundry Co. v. Com'r, 292 U. S. 182, 54 S. Ct. 644, 78 L. Ed. 1200. There is no basis in law or in reason for permitting the government, in order to tax non-existent income, to invoke the statute of frauds and repudiate, on the basis of the statute, contracts which a taxpayer has made in good faith and under which he has surrendered the right to receive the income which it is proposed to tax."

Furthermore, in the case of *Daley v. United States (9th Cir.), 243 F. 2d 466*, the Court in dealing with "holdbacks" held that such "holdbacks" under contracts were not accruable until paid and said:

> "With respect to the Delta Contract, the items of income consisted of the partial progress payments paid at the end of each calendar month upon approved estimates and ten per cent 'holdbacks' from those progress payments, paid upon completion and acceptance of all the work done under the contract. Under an accrual accounting method, the partial progress payments would accrue in the year when the right to receive the payments ripened with certainty. The remainder of the contract price would not accrue until the completion and acceptance of the contract. Costs would be apportioned over the contract price, and the costs applicable to the income accrued at the end of 1942 would be deducted in that year. Accord, U. S. v. Anderson, 269 U. S. 422, 46 S. Ct. 131, 70 L. Ed. 347; see Wagman, Tax Accounting for Long-Term Contracts, 33 Taxes 277."

In the case of *United States v. Harmon (10th Cir.), 205 F. 2d 919*, in a similar situation that Court said as follows:

> "It is the right to receive and not the actual receipt of income that determines when income must be included in gross income for income tax purposes. When the right to receive income becomes fixed and absolute, the duty of one on the accrual basis to report it arises.
>
> "Measured by this standard, it cannot be said that during 1943 Harmon's right to receive a definite, certain amount of the retained fee had become fixed and final. At the end of 1943, Harmon's interest in the retained portion of the fixed fee was subject to proper set-offs and deductions, if any, which might be revealed by the final audits. A number of things remained to be done upon which the determination of

that amount depended. The audits had not been completed. The outstanding claims had not been paid. Harmon's right to be credited with all these claims had not been finally determined. These matters were not determined until in 1944 and until that was done Harmon's interest in the amount of the fixed fee remaining in the Government's hands was not established with finality and certainty."

The most recent case upon a somewhat similar situation on this point is *Barham v. United States (4th Cir.), 256 F. 2d 456*, where the taxpayer received in a rather unique situation shares of stock in a building and loan association as part of the purchase price. The shares of stock had no market value and the Court held that the amount represented by said shares of stock was not accruable at the time they were received, because they had no market value and there was a contingency in connection therewith, and said:

"Until the right to an amount becomes accruable through fixation of the right to receive, the taxpayer is under no obligation to return it as income. Otherwise, he would be required to pay a tax on income which he might never have a right to receive. North American Oil Consolidated v. Burnet, 286 U. S. 417, 423-424, 52 S. Ct. 613, 76 L. Ed. 1197.

"* * *

"While it is true that taxpayers had an equity in the hypothecated shares, which they could sell if they could find a purchaser, that equity had no market value and was subject to such contingencies that as a practical matter it had no value for tax purposes. The fact that taxpayers received dividends on the shares is not controlling.

"* * * We agree with the test stated in Hudson v. Commissioner, 11 T. C. 1042, 1050, affirmed per

curiam 6 Cir., 183 F. 2d 180, also relied on by the government, that to avoid accrual taxpayers 'would have to prove that * * * some contingency or reasonable uncertainty about the ultimate payment was known to exist.' There was such contingency and uncertainty in the instant case."

In a similar situation, the Court has recognized that oil payments received for drilling by an accrual basis drilling contractor were not taxable until received and in the case of *Commissioner v. Edwards Drilling Company (5th Cir. 1938), 95 F. 2d 719*, said:

"It is of course true, as the Board points out, that under the accrual method of accounting employed by petitioner, items must be accrued as income when the events occur to fix the amount due and determine liability to pay. United States v. Anderson, 269 U. S. 422. Generally speaking, however, the income tax law is concerned, and its administration should deal only, with, realized losses, and realized gains. Lucas v. American Code Co., 280 U. S. 445. The taxpayer therefore, is under no obligation to pay a tax on income he might never receive. North American Oil Consolidated v. Burnet, 286 U. S. 417. A strained construction in administrative efforts to accrue income, should be avoided.

"Of the many cases supporting this view, Commr. v. Cleveland Trinidad Paving Co., 62 Fed. 2d 85; McPherson v. Helvering, 67 Fed. 2d 749, Burnet v. Logan, 283 U. S. 404; Woods v. Llewellyn, 252 Fed. 106, may be cited."

In the recent case of *Telephone Directory Advertising Company v. U. S. (Ct. of Claims), 142 F. Supp. 884*, the Commissioner assessed the corporation for future commissions which had not yet been earned when it was proved

that telephone advertising was indefinite and uncertain since it depended entirely upon the length of time that a particular directory would be in use. The Court in holding that such assessment by the Commissioner was improper, said:

> "In this case the Commissioner assessed the corporation for commissions which had not yet been earned, telephone advertising being indefinite because of the fact the advertising paid for month to month varied on how long that particular directory would be in use.
>
> "Under the well-settled annual accounting of revenues and expenses concept the Commissioner does not have the authority to allocate income to a taxable year other than the year in which a fixed right to receive a reasonable ascertainable amount exists. The Supreme Court in discussing the Commissioner's authority to shift income from one year to another stated in Security Flour Mills Co. v. Commissioner, 321 U. S. 281:
>
> "* * *
>
> " 'The uniform result has been denial both to the government and to the taxpayer of the privilege of allocating income or outgo to a year other than the year of actual receipt or payment, or, applying the accrual basis, the year in which the right to receive, or the obligation to pay has become final and definite in amount.' (321 U. S., pp. 286-287)."

It must be borne in mind at all times that the amount in question is actually a portion of the interest paid by the purchaser of the automobile, trailer or other chattel and that this interest payment is paid over a period of months or years. To assess taxes to a dealer for this interest before

it is paid is certainly in violation of all previous principles of law dealing with interest since it is normally income as it accrues.[5]

As stated in the case of *Chatham & Phoenix National Bank, 1 B. T. A. 460*, the Board of Tax Appeals said:

> "So much of the discount as was unearned within the year was therefore not a proper subject of accrual and the manner of accounting for discount went beyond either the cash or accrual basis and included as income within the year discount which was not income within the meaning of the law."

Furthermore, it was stated in the case of *Motors Securities Company, Inc., Tax Court Memorandum Decision (1952) P-H paragraph 52,316*, by the Tax Court as follows:

> "If, as respondent insists, the income resulted from a service charge, it was a service which covered the entire life of the paper, including as the record shows, requirements of receipt and collection of the installments due. See Linstedt-Hoffman Co., Supra. It would accordingly more clearly reflect income even on that approach for the payments to correspond to the expenses of acquisition and collection as the life of the note proceeded to its end. Southern Abstract & Loan Co. v. Commissioner (C. A. 6), 72 F. 2d 130."

The Commissioner in his brief concedes the logical basis and reasoning of the case of *Long Poultry Farms v. Commissioner of Internal Revenue (4th Cir.), 249 F. 2d 726*, but distinguishes it on the facts as it involves a cooperative. Certainly, no such distinction is justified since it deals fundamentally with the accruability or non-accruability of

[5] *American Bemberg Corporation v. United States (Dist. Ct. Del.), 150 F. Supp. 355.*

contingent income which is the same problem before this Court. It is also interesting to note that in this decision the Commissioner had similar rulings and regulations which he had strenuously relied upon in his brief but the Court in that case in discussing such regulations and the contingency of the income said as follows:

> "The Commissioner relies upon a regulation that he has adopted which accords with his contention in this case [Treasury Regulations 118 Sec. 3922 (a) 23]; but to the extent that this regulation is contrary to existing law or attempts to tax as income what is not income under law, it is, of course, void and of no effect. To require the inclusion in income of contingent credits such as are here involved, would be to require the patrons of cooperatives to pay tax upon income which they have not received, over which they have been given no control and which they may never receive."

It must be continually borne in mind that the obligation, if any there exists, is not upon the part of the finance company, but is solely on the part of the purchaser who is paying the monthly payments in discharge of the note. The finance company admits no liability to the dealer for the dealer's reserve. Obviously, therefore, the right to receive[6] cannot become fixed prior to the time the payor becomes obligated to pay.[7]

Finally, it would appear that some consideration should be given to the taxpayer's standpoint in this instance. Judge Hutcheson in the *Frost* case[8] after noting the

---

[5] *Spring City Foundry Company v. Commissioner, 292 U. S. 182, 54 S. Ct. 644, 78 L. Ed. 1200.*

[6] *R. H. McDonald, Tax Court Memorandum Opinion, Docket 35526 (August 31, 1953).*

[7] *Frost Lumber Industries, Inc. v. Commissioner, 128 F. 2d 693 (5th Cir. 1942).*

dilemma of a taxpayer as to what is accruable and what is not accruable, said:

> "We are told that the test whether an item of income or of loss is sustained in a certain year is a practical one, but when we see the different results different supposedly practical men get from applying the same test, we plainly see that what to one practical mind seems heresy, to another equally practical, seems doctrine. In this situation of every mind for itself the solution, we think, is the preferred one which 'in case of doubt gives the benefit to the taxpayer,' another rule modernly more often honored in the breach than in the observance."

This is also true of Judge Wisdom's statements in the *Texas Trailercoach* case[9] in which he said as follows:

> "The closer a tax comes to giving effect to the economic realities, the more bearable it is as the price of national security and of civilization. The real trouble in this case is that the taxpayer is asked to pay a tax on money he did not in fact receive and had no right to receive during the taxable year in question. He may never receive it, but he is asked to deplete his cash in order to pay it. If compelled to pay, the more business he does—the worse off his cash position will be. But, if a more realistic view is taken, the Government will not be deprived of any tax, because when the contingent credit materializes as a fixed ascertainable claim or if payments are received from the reserve account, the taxpayer must then include the fixed claim or payments in his taxable income."

This is only saying again what Judge Atwell said in the *Hine Pontiac* case:[10]

> "It is the soul and life blood of a tax against the citizen that the citizen should have received something which justifies that tax."

[9] *Texas Trailercoach v. Commissioner (5th Cir.) 1958, 251 F. 2d 395.*
[10] *Hine Pontiac v. United States (5th Cir.), 1 AFTR 2d 58-734.*

CONCLUSION

It would appear therefore, that the mere bookkeeping entry credit by a finance company which admits no liability to the dealer for said credit entry, and which credit entry is interest to be collected over a period of time, and is also subject to being used to offset losses of the finance company on the security, could not in any manner be considered as accruable income. Accordingly, the decisions of the *Hansen v. Commissioner of Internal Revenue* and *Burl P. Glover v. Commissioner of Internal Revenue* cases should be in all respects affirmed, and the decision in the *Baird v. Commissioner of Internal Revenue* case should be reversed and rendered.

Respectfully submitted,

JAMES C. MOORE,
2000 K Street, Northwest,
Washington 6, D. C.
Attorney of Record for Amicus Curiae, National Automobile Dealers' Association.

L. W. ANDERSON,
1201 Corrigan Tower,
Dallas 1, Texas.

By .....

CERTIFICATE OF SERVICE

Amicus Curiae, National Automobile Dealers Association, served three copies of Brief for the Amicus Curiae in Support of Taxpayer, in accordance with Rule 33, Subsections 1 and 3 (b), by depositing copies of the Brief in the United States Post Office at Washington, D. C., postage prepaid, addressed to Counsel of Record for Commissioner of Internal Revenue, J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

JAMES C. MOORE,
2000 K Street, Northwest,
Washington 6, D. C.
Attorney of Record for Amicus Curiae.

APPENDIX

INTERNAL REVENUE CODE OF 1954:

SECTION 1.446-1 GENERAL RULE FOR METHODS OF ACCOUNTING. PROPOSED REGULATIONS, METHODS OF ACCOUNTING.

"(2) Accrual Method—Generally, under an accrual method, income is to be included for the taxable year when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. Under such a method, deductions are allowable for the taxable year in which all the events have occurred which establish the fact of the liability giving rise to such deduction and the amount thereof can be determined with reasonable accuracy. The method used by the taxpayer in determining when income is to be accounted for will be acceptable if it accords with generally recognized and accepted income tax accounting principles and is consistently used by the taxpayer from year to year. For example, a taxpayer engaged in a manufacturing business may account for sales of his product when the goods are shipped, when the produce is delivered or accepted, or when title to the goods passes to the customer, whether or not billed, depending upon the method regularly employed in keeping his books. Likewise the extent to which indirect costs shall be included in computing costs of goods sold depends upon the method used by the taxpayer in treating such items in keeping his books."

INCOME TAX REGULATIONS:

"Section 29.41-3. Method of accounting.—It is recognized that no uniform method of accounting can be prescribed for all taxpayers, and the law contemplates that each taxpayer shall adopt such forms and

systems of accounting as are in his judgment best suited to his purpose. Each taxpayer is required by law to make a return of his true income. He must, therefore, maintain such accounting methods as will enable him to do so."

LEGAL OPINION 1086 I-1 C. B. 87:

"* * * in order to be accruable in the taxable year for which a return is made, a valid right to income must have arisen or existed in that year, which is enforceable on the date the income is due. If, however, the right to an amount is contingent upon the happening of some future event, there is no certainty that it will be paid or will accrue. In the event no income accrued from a fixed and determinable source, and no right to anything arises or exists in the taxable year which can be accounted for as income under any system of accounting."